Supreme Court, U.S.
FILED
AUG 7 1998
OFFICE OF THE CLERK

(4)

No. 97-1816

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

JAMES H. NEAL,

Petitioner,

v.

DISTRICT OF COLUMBIA
and
JOHN LATTIMORE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO BRIEF IN OPPOSITION

DANIEL M. SCHEMBER
GAFFNEY & SCHEMBER, P.C.
1666 Connecticut Avenue, N.W.
Suite 225
Washington, D.C. 20009
(202) 328-2244

Counsel of Record for Petitioner

August 7, 1998

Washington, D.C. • THIEL PRESS • (202) 328-3286

HR

Respondent Presumes the Answer to, Rather than Addresses, the Question Presented

Respondent presumes that "after *Sandin* [*v. Conner*, 515 U.S. 472 (1995)], there are certain restrictions and conditions of confinement that simply do not trigger the due process clause," no matter what prison rules say, and that the only question to be decided is the federal constitutional standard defining what these restrictions and conditions are. Resp. Br. at 12. Respondent proposes that the federal standard be the conditions found in "the most restrictive prison nationwide." *Id.* at 11.

Under Respondent's proposal, local law could never create a liberty interest because, obviously, no confinement in the nation could ever be more restrictive than the most restrictive confinement in the nation. A more fundamental problem, however, is that Respondent's proposal presumes the answer to, rather than addresses, the question presented.

The question here is whether there is a "due-process-triggering threshold," Resp. Br. at 7, defined by certain restrictions and conditions of confinement, below which prison rules cannot possibly create a liberty interest. The court below erroneously held that there is such a threshold. It held that, as a matter of federal constitutional law, no prison rule can ever create a liberty interest against 30-days' solitary confinement, or any confinement deemed comparable, because that was the confinement that had been imposed on the prisoner in *Sandin*.

Sandin, however, announced no such holding. *See* Pet. at 6-7. The error of the court of appeals was that it read *Sandin* as if the issue that had been decided was whether the Constitution itself creates a liberty interest against 30-days' solitary confinement. Where a liberty interest is claimed to arise from prison rules, however, not the constitution itself, the relevant point is not the severity of the conditions *per se*, but their severity compared to the conditions that prison

officials may impose on a "totally discretionary basis." *Sandin*, 515 U.S. at 486; Pet. at 6-7.

Contrary to Respondent's Brief at 11, "determination of whether prison officials have discretion to place prisoners in similar settings" is not "*Hewitt* [*v. Helms*, 459 U.S. 460 (1989),] methodology abandoned by *Sandin*." The *Sandin* opinion said that *Hewitt* methodology was limited to determining whether substantive standards restrict officials' discretion to impose a particular type of confinement -- there, administrative segregation. *Sandin* held that substantive standards restricting officials' discretion to impose one type of confinement are not sufficient to create a liberty interest where the same officials can impose other types of equally-restrictive confinement, such as disciplinary segregation, on a totally discretionary basis.

Respondent's Other Arguments Lack Merit

Respondent erroneously argues that the prison rules here, Pet. at 3, n.1, are insufficiently specific to restrict discretion. Resp. Br. at 12, n.5. Respondent overlooks that segregation must be based on "factual information" showing a "definite" or "clear and present" escape risk or threat to safety. The trial court properly found that these standards restrict discretion, since the "substantive predicates ... are just as specific as those the Supreme Court considered in *Hewitt*." App. Pet. 31a. Respondent cites no authority to support its opposing view.

Respondent erroneously argues that the prison rules here cannot create a liberty interest because the Attorney General or high-level prison officials may transfer some prisoners outside the District of Columbia prison system. The prison officials who placed Mr. Neal in segregation did not have this transfer authority. That high-level prison population management decisions, unrelated to the behavior or circumstances of individual prisoners, might on occasion

supersede some institutional decisions does not preclude creation of a liberty interest for the prison population that remains in the prison system.[1]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Daniel M. Schember
Gaffney & Schember, P.C.
1666 Connecticut Ave., N.W.
Suite 225
Washington, D.C. 20009
202/328-2244

Counsel of Record for Petitioner

August 7, 1998

---

[1] Contrary to Respondent's view, the separate issue discussed in footnote 15 of Respondent's brief would not have to be addressed if certiorari were granted. Respondent declined to file a cross-petition raising this issue. It is not the court's obligation to cure Respondent's default.